

# The Role of the Dispute Review Boards and State Arbitration

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# Learning Objectives

- Know the basic principals behind DRBs
- Know the FDOT DRB procedure
- Know the FDOT Arbitration Board procedures

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# DRB History

- Originally developed in the underground construction segment of the industry
- Industry leaders got together and looked for something better than traditional dispute resolution
- First DRB guidelines published in 1985 and revised in 1991 by the American Society of Civil Engineers

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# Traditional Dispute Resolution Alternatives

- Negotiate (OK but if not successful we still have a dispute)
- Arbitration
- Litigation

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# Shortcomings of Traditional Dispute Resolution Alternatives

- **Timing** – Issues often aren't resolved until long after the project is complete
- **Accuracy of Information**- Timing effects accuracy. Memories fade. Written records are difficult to maintain.
- **Cost** – It cost a lot. In both \$ and people time.
- **Judges/Jurors Not technically competent** - They don't know the technical construction and engineering issues.
- **Judges/Jurors Don't know the whole story**- They weren't there.



# The Truth About Litigation

What it is really like?

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# Timing

- Project in question is complete
- FDOT project staff are now working on new projects

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# Step 1

## Contractor Sues FDOT

- FDOT Attorney must file answer to plaintiff's complaint
- FDOT Attorney must get issue/project information from Project Engineer/Manager



## Step 2

# Pretrial Discovery

- Both sides require document production
  - Copies of all correspondence from anyone including construction and design development
  - Copies of all project documents including construction and design development
- Both sides require depositions (testimony under oath) from all principal personnel
  - Project engineer, manager, inspector, designers, District Construction Engineer, ect.

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## Step 2 Continued

- You are asked questions by the opposing attorney
- You only get to answer the questions asked
- Depositions are stressful ( Not fun )
- They can last for hours



# Step 3

## Case Preparation

- Detailed case arguments with supporting documentation must be prepared

Who does this ?

You do!

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# Step 4

## Expert Witnesses

- Each side hires experts
- Experts prepare reports
- Experts must now give depositions
- You must review expert reports and depositions

# Step 5

## Mediation

- Court requires a mediation hearing before trial
- You and opponent meet with mediator and try to resolve issue
- You must prepare in advance with your attorney
- Mediation meeting takes all day

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# Step 6

## Trial

- You must prepare with attorney for trial testimony
- You must attend trial and give testimony (you only get to answer questions asked)
- Attorneys may or may not accurately present the real issues
- Decision is made by people who do not know anything about your work
  - They know nothing about your contract
  - They know nothing about engineering
  - They know nothing about how to build roads and bridges

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Litigation cost a lot, in money and in  
the time of key personnel.

The outcome is uncertain.

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# DRB Core Principals

1. Panel of three, experienced, respected impartial reviewers
2. Board formed before construction begins
3. Board meets periodically at the project site and keeps abreast of progress and issues
4. Hearings may be requested by either party
5. Hearings are held promptly and are informal
6. Board recommendations are not binding, but may be considered by arbitration boards and trial courts

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# National Results

- DRB Foundation reports more than 1300 projects with DRBs (approx. \$90 Billion) since 1979
- More than 1500 disputes heard by DRBs

97 % of disputes settled without litigation or arbitration.



# Florida Owners Using DRBs

- Florida Department of Transportation
- Tampa-Hillsborough County Expressway Authority
- Orlando-Orange County Expressway Authority
- Miami-Dade Expressway Authority
- Greater Orlando Aviation Authority

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# Why Are DRBs More Effective?

- All three board members are neutral and subject to the approval of both parties
- All three board members are experienced professionals
- DRBs meet regularly at the project and keep informed of project issues
- Either party can bring an issue to the DRB for a recommendation
- Hearings are held informally and promptly

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# FDOT DRB and Arbitration Procedures

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# Assignment of DRBs to Projects

- Projects of approximately \$10 million and larger are assigned a project DRB (decision is based upon the nature of the project)
  - provisions for DRB are included in specifications
- All other projects have access to a Regional Disputes Resolution Board for hearings

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# Board Formation

- FDOT maintains a listing of qualified DRB board member candidates with contact information and resumes
- Candidate members have completed a course on DRB procedures offered by the Disputes Resolution Board Foundation
- Each party (FDOT and Contractor) select one DRB member who must be approved by the other party.
- The two selected members choose a third member, who usually chairs the board

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# Removal of Board Members

- A DRB member can be removed, with or without cause by the party that appointed him/her
- A DRB Chair can only be removed with the agreement of both parties and agreement of the other two DRB members, except in the case of conflict of interest



## Best Practice

Select DRB members based upon their **experience**, **knowledge** relevant to the project, **impartiality** and **availability**.

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## Best Practice

When contacting prospective DRB members, disclose the project participants so that a conflict of interest situation can be avoided.

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# Three Party Agreement

- Signed by all DRB members and representatives of the FDOT and the Contractor
- Provides operating procedures
- Provides responsibilities of parties
- Representations and certifications

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# Board Meetings

- DRB meets periodically at the project site and keeps abreast of project developments
- FDOT procedures provide for monthly meetings for the first 3- 6 months, and then not less than quarterly until project completion
- Meeting frequency is decided jointly by the FDOT and the Contractor

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# Submitting Disputes to the DRB

- Issues must follow the partnering escalation process prior to DRB referral
- The Contractor or the FDOT may request a hearing to obtain a DRB recommendation concerning a dispute
- The requesting party must furnish a written request for a hearing to the DRB Chairman, with concurrent copies to the other DRB members and other party to the contract

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# Submitting Disputes to the DRB

- Written request should provide a concise issue statement and a summary of relevant issues
- Responding party may furnish a concise issue statement to the Chairman with concurrent copies to the other DRB members and other party to the contract



# Submitting Disputes to the DRB

- The DRB Chairman will schedule a hearing no earlier than 20 days after receiving the request for a hearing (time may be reduced to coordinate with regularly scheduled meetings or for urgent matters)
- Full position papers shall be submitted by each parties and must be accompanied by supporting documents which are numbered and referred to in the position paper by page number

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# Submitting Disputes to the DRB

- Full position papers are due 15 days prior to the scheduled hearing and are submitted directly to each DRB member and to the opposing party
- Each party may submit a rebuttal statement to the other party's position statement no later than 5 days prior to the hearing date

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# Submitting Disputes to the DRB

- For complex disputes, the DRB may meet privately in advance of the hearing to review the issues
- DRB may also hold a pre-hearing conference with the parties to discuss hearing procedures
- At least 5 days prior to the hearing, both parties should furnish to the DRB members and the other party a list of people who will attend the hearing and represent them





# Conduct of the Hearing

- Hearings will normally be held at location convenient to the parties and the DRB
- Hearing procedure is informal
- The party initiating the hearing will first discuss the dispute followed by the other party

# Conduct of the Hearing

- Each party may offer rebuttals until all information is presented
- DRB members may ask questions
- If new information not contained in the initial position papers is presented, the protesting party may be given a continuance of up to 30 days to research the issue and prepare a rebuttal

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# Conduct of the Hearing

- Normally, no formal record of the hearing will be kept
- Audio or court reporter recording will only be permitted if agreed to by both parties
- The requesting party will bear the cost

# Issuance of DRB Recommendations

- The DRB will meet privately following the hearing to develop a recommendation
- If additional information is required, the DRB may schedule a follow up hearing

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# Issuance of DRB Recommendations

- A written recommendation with supporting logic will be provided by the DRB within 15 days of the hearing date
- In the event the DRB is not able to reach a unanimous decision, the dissenting member may provide a minority opinion to be furnished with the recommendation
- The dissenting DRB member will not be revealed

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# Reconsideration of a DRB Recommendation

- Either party may request a reconsideration of a recommendation by the DRB
- Reconsideration should only be considered when there is new information
- If the DRB feels that the request for reconsideration is meritorious, it will honor the request
- Usually, a new hearing is not required

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# Regional DRBs

- Each FDOT District has a Regional DRB resource available to projects without a Project DRB
- Board members serve for one year and are selected based upon their experience and qualifications

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# Regional DRBs

- RDRBs do not hold regular job site meetings
- Either party in a contract eligible for RDRBs may request a hearing by submitting a written request to the Board Chairman
- The hearing process follows the same procedures as established for regular project DRBs

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# Making the Best Use of a Project DRB

- Open disclosure of project status information including “issues”
- Don’t ask for advice
- Give attention to questions asked by a DRB member during a meeting

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# Advice on Hearings

- How do DRBs decide on recommendations?
  - Facts (from observation, records, testimony)
  - Contract terms (from contract documents)

Note that being fair is not a consideration.



# State Arbitration Board

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# Board Composition

- Three members
  - One appointed by FDOT
  - One chosen by contractors (FTBA)
  - Two appointed members chose the third member

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# Procedures

- Either the FDOT or Contractor may bring a dispute to the Board
- All disputes must have first been heard by a DRB (DRB recommendation is considered)
- Claims less than \$250k must go to SAB
- Claims \$250k to \$500k may go to SAB
- Claims \$500k to \$1million may go to SAB with both party's agreement



# Procedures

- Claimant must submit
  - Request for Arbitration Form
  - Request for Time Form
  - Statement of Claim with supporting documentation
- Hearings are relatively informal
  - Attorneys are present
  - Each side makes presentation
  - Board ask questions

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# Procedures

- Party bringing the dispute must pay a fee when requesting the arbitration
  - From \$500 to \$5000 depending on size of claim

# DRB System Has Reduced Arbitration Hearings

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# Additional Resources

- FDOT Three Party Agreement
- FDOT DRB Procedures and Guidelines
- Project Specifications

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### Dispute Review Board



The role of the Dispute review Board is to provide specialized expertise in technical areas and in administration of construction contracts to assist the Department of transportation and the Contractor in resolving disputes in a timely and equitable manner.

<b>Topics</b>	<b>DRB Foundation Training</b>
<a href="#">Dispute Resolution Board Foundation Website</a> (Opens New Browser Window)	<a href="#">View upcoming training events</a> (Opens New Browser Window)

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# Future Questions ?

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